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266502—40

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 435

CONTINENTAL CASUALTY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the Eastern District of Louisiana (R. 234–244) is reported in 29 F. Supp. 598. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 272–276) is reported in 113 F. (2d) 284.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit was entered on July 9, 1940 (R. 276). A petition for rehearing (R. 277–280) was denied August 2, 1940 (R. 281).

The petition for a writ of certiorari was filed on September 14, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

This is a suit by the Government against a surety for liquidated damages and excess costs incurred upon default by the contractor. The questions presented are:

1. Whether certain correspondence which ensued after the default between the surety and the Government's contracting officer gave rise to a contract for the completion of the work by the surety, and, if so—

2. Whether the contracting officer's subsequent statement that no progress payments would be made was a breach of that contract.

3. Whether a breach of the contract relieves the surety of its original obligation on the bond.

4. Whether there was evidence to support the amount of damages awarded.

STATEMENT

On November 17, 1932, the United States entered into a construction contract with the Grasser Contracting Company as principal (R. 3, 53), and the Continental Casualty Company, petitioner, as surety (R. 3, 4, 53). Certain items were to be completed by February 27, 1933, and others by September 25, 1933 (R. 4, 53, 235, 236). The contract and

specifications provided for liquidated damages at the rate of $20 per day per item for each day of delay beyond the date set for completion (R. 5, 236). Although certain items were not completed on time, the contractor was permitted to proceed until March 17, 1934. On March 16, 1934, the Grasser Company filed a voluntary petition in bankruptcy in the Eastern District of Louisiana, New Orleans Division, which under the contract operated as a default by the contractor (R. 5, 236). On March 17, the contracting officer of the United States declared the Grasser Company in default pursuant to the provisions of Article 9 of the contract (R. 5, 58, 59, 236),[1] and on the same date advised petitioner

[1] Article 9 of the contract provides (R. 274):

"* * * If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated dam-

of the action taken, requesting it to state whether or not, as surety, it desired to complete the work (R. 59–60, 237). In response, petitioner advised that it would complete the contract "provided all necessary legal steps have been taken by the government to cancel and annul the Grasser contract" (R. 61, 62, 237). On March 26, 1934, the contracting officer wrote that the notice of default was "the only action necessary in the premises" (R. 63–64, 237). In a letter of March 28, 1934, petitioner agreed that "this letter [of March 17, 1934] would seem to be a sufficient termination of the contract" (R. 64, 237), suggesting, however, that notice be served upon the receiver or trustee in bankruptcy or upon the Bankruptcy Court (R. 65, 237). Notice was served on the receiver (R. 65–66).

On April 3, 1934, petitioner's attorney requested to be advised whether it would be the policy of the contracting officer to make progress payments to the surety (R. 67, 239). On the same date the contracting officer, inaccurately citing a syllabus from a decision of the Comptroller of the Treasury (4 Comp. Dec. 611), wrote that "no payments may be made to the surety during the progress of the work" (R. 68–69, 239, 240).

In a reply letter of April 6, 1934, petitioner stated that the contracting officer's letter of April 3, 1934,

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ages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof; * * *."

was a modification of the terms of the contract, not acceptable to petitioner, and that, consequently, petitioner "will not complete the contract under these new terms and conditions" (R. 71, 240). On April 28, 1934, petitioner was informed that a supplementary contract with progress payments might be entered into (R. 72, 240), but on May 2, 1934, petitioner refused this offer (R. 73–78, 240).

On July 24, 1934, petitioner was notified that bids would be opened on August 8, 1934, for the completion of the unfinished items and that the surety would be held liable for any excess costs occasioned the Government thereby (R. 6, 240). A new contract was let to Cralan, Inc., of New Orleans, Louisiana (R. 7, 240) at a cost substantially in excess of that of the original agreement. After completion of the work, the Government filed this suit to recover from the surety the excess cost, together with liquidated damages under the contract for delay from the contract date of completion until the Grasser Company was declared in default.[2]

The District Court, after making findings of fact (R. 234–242) and conclusions of law (R. 242–243), entered judgment for the Government. The District Court held that there was no contract between the Government and petitioner for the completion of the work; that if there were a contract, the action of the contracting officer was not a breach

[2] The Government's claim for $26,774.70 is itemized at pp. 13–18 of the record.

thereof; and finally, that if there had been a breach of contract petitioner had not been damaged. A motion for a new trial (R. 245–254) was overruled (R. 255). The Circuit Court of Appeals for the Fifth Circuit affirmed (R. 272–276).

ARGUMENT

This action is one to recover from petitioner, the surety on a contractor's bond, damages sustained by reason of the default of its principal. The default is not denied. While conceding its original liability, petitioner contends that it entered into a new contract with the United States to complete the work remaining under the original contract, and that it was relieved of liability on the bond because the contracting officer, on April 3, 1934, stated that progress payments would not be made to petitioner if it undertook to complete the work. The petitioner further contends that certain items of damages were improperly allowed. The courts below found against petitioner on each issue of fact and law, and the case presents no question which would warrant review by this Court.

1. (a) There was no agreement for the petitioner to proceed under the old contract. If the petitioner's contention is that it had undertaken to perform the original contract, the answer is that the contracting officer and petitioner never reached a mutual understanding to this effect (R. 242, 275).[3]

[3] The District Court held (R. 242–243): "The evidence in this case shows the absence of any mutual understanding or

Cf. *South Boston Iron Co.* v. *United States,* 118 U. S. 37. If the petitioner contends that the parties executed a new agreement, it is met with a further and additional difficulty that the agreement was never executed by formal writing as required by Revised Statutes, Section 3744 (*Bedding Company* v. *United States,* 266 U. S. 491; *Erie Coal Co.* v. *United States,* 266 U. S. 518).

(b) Even assuming that a definite contract for the completion of the work had been entered into, the contracting officer's letter of April 3, 1934, stating that no progress payments would be made, did not amount to a breach of the contract by the United States. It is not contended that the contracting officer had authority to construe the agreement. So far as appears, therefore, the contracting officer's interpretation amounted [4] at most to an erroneous conclusion of law by a Government officer on a question beyond his competence, and the Government was not bound by his unauthorized

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agreement between the parties in that the defendant's expressed desire to complete the work in accordance with the terms of the contract was conditioned upon the cancellation and annulment of the Grasser contract; whereas, the contracting officer did not contemplate a cancellation and annulment of the Grasser contract, but rather the termination of the contractor's right to proceed with the work and the completion thereof by the surety in the name of the contractor."

[4] The contract (Plff. Ex. 2) which is not printed in the record contains nothing to show that the construction of the agreement was within the scope of the contracting officer's authority.

action.[5] Moreover, the erroneous interpretation did not amount to a repudiation of the alleged agreement. *Mobley* v. *New York Life Ins. Co.*, 295 U. S. 632; *New York Life Ins. Co.* v. *Viglas*, 297 U. S. 672.

(c) The conclusive answer, however, is that the breach of contract, if any, did not relieve petitioner of its obligations under the original agreement. Upon the default of the contractor, petitioner's liability as surety became fixed. *United States* v. *United States Fidelity & Guaranty Co.*, 236 U. S. 512; *Board of Education* v. *Maryland Casualty Co.*, 27 F. (2d) 20 (C. C. A. 3d). It is not and cannot be contended that the agreement, if any, between the petitioner and the contracting officer was intended to release petitioner from its liability as surety under the original contract. *American Employer's Ins. Co.* v. *United States*, Court of Claims No. 43921, decided May 6, 1940; *Fidelity & Casualty Co.* v. *United States*, 81 C. Cls. 495. The petitioner is,

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[5] The matter under discussion was one for decision of the accounting officers of the Government, as is shown by the decision which the contracting officer cited (4 Comp. Dec. 611). Acts of federal agents in excess of their authority do not bind the United States. *Whiteside* v. *United States*, 93 U. S. 247, 256; *Hawkins* v. *United States*, 96 U. S. 689. See also *Jones* v. *United States*, 18 Wall. 662; *Hale County, Texas*, v. *American Indemnity Co.*, 63 F. (2d) 275, 279 (C. C. A. 5th); *The Underwriter*, 6 F. (2d) 937 (D. Conn.). Moreover, the opinion cited by the contracting officer disclosed on its face that his construction was erroneous. The petitioner, however, made no effort to obtain reconsideration of the question.

therefore, obligated to pay liquidated damages from the contract date of completion to the date of default, and, in addition, to pay the excess costs and actual damages sustained in the completion. *American Employer's Ins. Co.* v. *United States, supra;* see also *Fidelity & Casualty Co.* v. *United States, supra.* While petitioner might have reduced the excess costs if it had completed the contract, it elected not to go forward under the agreement. Moreover, petitioner has not shown that it could have completed the contract for an amount less than the bid submitted by Cralan, Inc.[6]

2. Petitioner also urges that certain items of damages, grouped under the heading of "Govern-

[6] Petitioner alleges that it had an assignment from the contractor of all the equipment on the job and an agreement with the American Bank & Trust Company, mortgagee of the machinery, that the latter would not deprive petitioner of the equipment until the job was completed. Petitioner alleges further than after receipt of the contracting officer's letter of April 3, 1934, it considered the matter closed, and that on April 24, 1934, the mortgagee made a settlement with the Trustee in Bankruptcy and sold the equipment to Cralen, Inc. (Pet. 8–9). But the correspondence between petitioner and the American Bank & Trust Company shows clearly that the latter had no intention to permit petitioner to use the equipment without payment of rental (R. 127–130, 126, 121–123, 125, 227). Moreover, there is no evidence to show that petitioner could not have made the same arrangements on April 24, 1934, when it received the offer for a supplemental contract (R. 228–229). In any event, as stated *supra*, petitioner has not shown that, even with the Grasser equipment, it could have saved more than the amount it now must pay.

ment Costs" were improperly allowed (Pet. pp. 18–28). "Government Costs" were composed of two elements: Job Overhead and Area, District and Division Overhead. Petitioner apparently contends that these costs were not damages sustained by the United States. The trial court found as a fact, however, that "Government Costs" "constitute an item of damage actually sustained by the Government" (R. 241). The court below in addition found that "the record contains substantial evidence to support the finding of damages made by the trial court" (R. 276).

Independently of the findings of the courts below, "Government Costs" were proper items of damage. Job Overhead represented sums actually spent on the job for inspection, supervision, etc. (R. 177). These are properly recoverable when expended after the contract date of completion. *United States* v. *Breymann,* 228 Fed. 808 (D. Mass.); *United States* v. *McGee,* 171 Fed. 206 (W. D. Mo.). Area, District and Division Overhead not allocable to particular jobs, but charged to jobs on a percentage basis, is also recoverable. See *M. H. McCloskey, Jr., Inc.,* v. *United States,* 66 C. Cls. 105; *Dow Pump Co.* v. *United States,* 68 C. Cls. 175; *Pope* v. *United States,* 75 C. Cls. 436. Petitioner's argument that these expenses would have had to be borne if Grasser Company had completed the job (Pet. 20) overlooks the fact that if the Grasser Company had completed on time, they would not

have been necessary, and that if the Grasser Company had continued with the work instead of Cralan, Inc., the liquidated damage provision of the contract would have indemnified the Government.

CONCLUSION

The decision below is correct. There is no conflict, and the case presents no question of general importance. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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